LOS ANGELES BAR BULLETIN

In This Issue

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LOS ANGELES

BAR BULLETIN

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VOL. 20 DECEMBER, 1944 No. 4

LOOSE TALK

LOOSE or careless talk about the Constitution, bureaucracy, free enterprise and dictatorship does not help to solve the very real economic and social problems of this era or to preserve personal rights or democratic processes. When engaged in by lawyers in their private discussions or public speeches, it tends to undermine the standing of the profession. All will concede that the economic changes of the past decades, the waging of war, the accumulation of debt, and the reconversion to peace join to create conditions which require governmental action. If our profession is to preserve the place which tradition gives it in our governmental scheme, the individual lawyers must be sure that their comments regarding measures aimed at solving new problems are reasoned comments. If the lawyers will be well informed, creative and constructive in their criticisms of measures which are proposed or enacted to meet new conditions, their influence will be effective to assure that such measures will be made to fit in to our constitutional scheme. The individual lawyer fails in his public duty when, without personal analysis,

he loosely criticizes honest political efforts to solve real problems of the era as unconstitutional and bureaucratic.

American lawyers are sworn to support the Constitution and, like the great majority of the American people, believe in Freedom, in Democracy, in Free Enterprise and in Free Competition. Our education and our practice have made us know, better than the lay man, that in a complex society, men cannot be entirely free, many freedoms must be restrained, free enterprise and free competition cannot be entirely free but must be subject to regulations and restraints, government cannot be wholly spontaneous or entirely democratic but must be in the hands of an aristocracy of training and intelligence. The business of lawyers consists pretty largely of enforcing, and defending against restraints on complete freedom, so lawyers understand these restraints.

Lawyers know that the police power is an elastic and developing power which stretches and changes to meet new conditions raised by changing times. Our State Supreme Court has well stated that "the police power is not a circumscribed prerogative, but is elastic and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.' . . . That is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions." (195 Cal. 485.)

Lawyers fully understand the distinction between the question of the political wisdom of a regulatory measure and the question of its constitutionality, whereas the distinction usually is not understood by laymen. The distinction between the substantative regulation of a personal right or a property right and the procedure by which the regulation is administered and enforced is well known to lawyers when they think about it. In the field of procedure the organized bar is doing much constructive work to see that in the administration of regulatiory measures democratic processes are followed and constitutional rights are preserved. Lawyers who take the time to know about this work and to

understand the fundamental and constitutional principles involved in it are more constructive and convincing in their expressions of their views on regulatory measures.

There is much to be done in solving problems which are raised by new conditions, much to criticize and change in many measures which have been adopted, much to praise and to improve in other measures. Lawyers have the training and the opportunities to lead in solving the problems of the era and in assuring the public that the measures and principles which are adopted will fit into our constitutional scheme and preserve our personal and property rights. If the lawyers are to maintain their traditional influence in shaping the future of the nation, and are to retain the confidence of the public in matters of constitutional law, the individual lawyers will see to it that they know and understand the problems of the day, the regulatory measures which are proposed to meet them, and the constitutional principles which are involved. They will see to it that their personal criticisms or approvals of such measures are based on reasoned grounds—A. D.

BY THE BOARD

City Charter: Trustee Paul Schwab made a progress report of the special committee on qualifications of citizens who serve as Commissioners of the City of Los Angeles. The committee met with the Mayor and representatives of the City Attorney's office. As a result, an amendment to the city charter is being drafted for submission to the City Attorney's office, which will afterward be passed upon by the committee and brought before the Board of Trustees.

* * *

December Meeting: A social gathering of members—no speeches or formal program—will be held at the L. A. Breakfast Club December 22. All members who have been admitted to practice 50 years or over will be invited guests. President McClean appointed as a special committee on arrangements, Don Lake, Chairman; Clyde Triplett, Board member, and Ugene U. Blalock, Clarence W. Byrer, Frank D. Catlin, Henry W. Catlin, Stuart Hacker, Byron C. Hanna, Herbert A. Huebner, J. J. Lieberman, Judge William B.

McKesson, E. Llewellyn Overholt, Preston D. Richards, Judge Carl A. Stutsman, Leonard Wilson and Roland Rich Woolley.

* * *

Lawyers' Reference Service: The Lawyers' Reference Service Committee, in a special report, recommended that it be authorized to prepare for general distribution through the Association's office, a pamphlet informing claimants of their rights to the facilities of the Small Claims Court, and explaining the procedure of that court. The Board gave such authorization. The committee also recommended that it be authorized to establish a special panel of registrants for the preparation of income tax returns; that a registration fee of $2.00 be charged each registrant and that the proceeds be devoted, as far as practicable, to publicising the existence of such panel; registrations of the panel to be on the same basis as permitted by the Board during the last income tax period. The Board gave authorization, and the committee was also authorized to use funds now to its credit to publicise the Lawyers' Reference Service.

* * *

Legal Interest Rate: Judge William J. Palmer, in a letter, suggested certain changes be made in the legal rate of interest on judgments, and that consideration be given to bring about a procedure by which the legal effect of guardianship for adult persons may be accomplished without the necessity of attaching to the ward the stigma of incompetency; suggesting the softer term "conservator." The matter of legal rate of interest was referred to the Committee on Pleading and Practice, and the guardianship matter to the Committee on the Section on Probate, Real Property and Trusts, to study and report to the Board.—E. D. M.

COMMENT AND CRITICISM

Plebiscite: That was a thoughtful, interesting article by Kemper Campbell, in the *Journal,* on the plebiscite. It expresses the thought of many lawyers on this controversial subject. His chief objections: the lack of outstanding opposition candidates to incumbents, and the lateness of the plebiscite

with relation to the election, are sound. He thinks it is the Trustee's duty to induce qualified lawyers to become candidates for the bench. But how? Such an effort was made several years ago, without success. At all events the whole subject of the plebiscite is to be reexamined by a special committee of the Association.

* * *

Administrative System: One of the many things which ABA's past president Henderson thinks lawyers could and should do, is to attack, through legislation, "the separation-of-powers problem presented by the administrative agencies. So far as is possible, without jeopardizing our goals, we must work to divide power; we must be alert to strengthen judicial review." In this connection, your attention is invited to an article in this BULLETIN, on the McCarran-Sumner bill,—the A.B.A. bill.

* * *

Emergency Suspension: Some organizations urge that Congress should suspend, during the emergency and for a limited time thereafter, the operation of those federal statutes which prohibit lawyers who have been in government service and members of their firm, from prosecuting claims against the federal government, within the periods provided. We seriously question the purpose of such a movement.

* * *

Restatement of the Law: Judge Goodrich, U. S. Circuit Court, 3rd Circuit, who is Assistant Director of American Law Institute, is quoted by ABA *Journal,* as saying the Restatement, undertaken in 1923, has now been completed and the last volumes are on the way to press. He says it's too early to appraise the importance of the Restatement on our law, but the latest figures on judicial citation show 10,721 instances in the reported decisions of appellate courts throughout the country.

* * *

"Poor Man's" Statutes: January 1, 1945, Missouri's Poor Man's law, designed to give the poor man a better "break" in the civil courts, becomes effective. It gives opponents opportunity to meet in conference with the judge before trial to agree on facts and law, to eliminate time-consuming argument; all demurrers and motions must be disposed of at

a specific time; a defendant outside the court's jurisdiction may be served by mail, but publication method is not outlawed; appeals will be simplified and less expensive, and forms of legal processes standardized.

* * *

Phantom Court House: We hear they are actively engaged in drawing plans for a "court house." It is to sit —or stand—north of Hall of Justice, on Spring Street, where there is now a 200-foot hill. No one knows, yet, where the bulk of the cost is to come from. Bond issues are too unpopular with taxpayers, and begging from Uncle Sam would go pretty sour with a lot of people. So what?

* * *

Lawyers' Reference Service: In the first 8 months of this year 792 persons who sought an attorney through the Bar Association Office were referred to bar members who are registered for the reference service. It costs but $3.00 a year to register. Non-members of the Association are eligible. Less than 300 are now registered.

* * *

More "Plebicitis:" From the inception of the bar plebiscite on judicial candidates—Superior and Municipal courts —in 1920, to and including 1941, there were 279 candidates endorsed, and 247 of these were elected. That is a percentage of 88.5. We haven't available the number of the endorsees who were incumbents, but probably a large majority were. No other bar plebiscite in the country has such a high percentage of elected endorsees. Incidentally, some of the large eastern associations modeled their forms of questionnaires after ours, as such forms were used by LABA in the 1930's.

* * *

Women Lawyers: How many of the fair sex are practicing in Los Angeles County? Careful inquiry fails to develop reliable figures (digits). Some say 3-400. Seems too high. At any rate, 64 are members of LABA, which still is, relatively, a smaller percentage than men—lawyers whose names are found on the list of just about the best bar association in the country. The women are always

active and progressive in their own group. We should have more of them on the hard-working committees.

* * *

Are You Listening to the ABA radio program on KHJ, Sundays, 2-2:30 p. m.? The first program was heard November 26. The theme is "Let's Face the Issue," and is after the fashion of the "round table" type of discussion. The first subject discussed was what should be done with government war plants. The moderator is Leland Rex Robinson, educator, economist, and business consultant. On December 3 the subject was "Should the two-thirds rule for ratification of treaties by the Senate be changed to a majority?" The title of the series, "Let's Face the Issue," seems inept.—E D. M.

NEW MEMBERS

Again the BULLETIN takes pleasure in presenting the names of persons who have become new members of the Association, or whose memberships have been reinstated. The following list covers the period from October 3, 1944, to November 29, 1944.

Roger Arnebergh	Clifford P. Grua	Frank J. Mackin
Perry F. Backus	Russell Hardy	Everett H. Mills
Findlay A. Carter	George Harnagel, Jr.	Edward D. Neuhoff
Mark Chiesa	Victor J. Hayek	John W. Rankin
Chaplin E. Collins	F. George Herlihy	Fred O. Reed
William M. Curran, Jr.	Bates S. Himes	Joseph L. Reina
T. G. Dalton	Ellis I. Hirschfeld	N. Joseph Ross
E. J. Fostinis	Judson J. Hughes	Eugene E. Sax
David E. Fulwider	Melvin J. Keane	Clinton F. Seccombe
Leo Goodman	Richard L. Kirtland	Lewis C. Teegarden
Maurice Gordon	Charles A. Loring	Albert W. Thomas

YES, WE HAVE NO MILLION DOLLARS !

By Thomas S. Dabagh,
Librarian, Los Angeles County Law Library

That fool female, Dame Rumor, has been spreading a whopper lately, to the effect that the Los Angeles County Law Library is rich,—millions in cash and bonds,—can afford anything,—so much money they don't know what they'll ever do with it all!

Sorry to disillusion you, friends, but 'tain't so. There be no millions, and what dollars there be may prove only barely

enough for bare necessities,—come time to build the badly needed new quarters!

Let's review the whole thing realistically: What do we want for our money? How much will it cost us? And, Can we afford it?

What Do We Want For Our Money? Speaking only for myself, but I think with some knowledge of the hopes and desires of most judges and attorneys, we (or should I say I) want the best planned law library in the country, with adequate space for books and readers, with suitable work rooms and offices, with any gadgets and facilities that will be helpful, with top quality materials and equipment throughout, and with all the comforts of a modern office building.

Air conditioning? Yes. Sound proofing? Of course. Scientific lighting? Certainly. Ample telephone accomodations? Sure.

What else? A lecture room to seat about 300, a browsing room for displays and the reading of "non-bread-and-butter" legal literature, plenty of dictation and consultation rooms, a committee room, a large smoking room, an equally large students' room, a dozen and a half study carrells, a microfilm viewing room, and special reading rooms for reference to briefs and transcripts, and to foreign law materials.

What about space for readers? In addition to the special rooms and the carrells just mentioned, space for at least 275 readers should be provided in a reading room which will have satisfactory proportions, with a high ceiling, and with no structural columns or other obstructions to mar the architectural effect. The total reader space will then be about four times the present available space, which seems about right in the light of how crowded conditions were before so many of the younger men went off to war.

What about space for books? Well, figure we'll need space for about 240,000 books when we move in, and expansion at the rate of 10,000 volumes a year for twenty-five years, to make a total of 490,000 volumes. Better provide for 500,000 books, and count on storage and microfilming, or other methods of copying in miniature, of the bulky, less-used ma-

terial to make space and to help take care of further expansion in the more distant future.

How Much Will It Cost Us? Now that's something we can only guess at, as we don't know what post-war costs are going to be. However, we can make a fairly good estimate on the basis of pre-war price levels, as follows:

$352,800 for the building;
150,000 for steel book stacks (including shelves, etc.);
35,280 for miscellaneous expenses, including the architect's fee;
70,560 for furniture and equipment;

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or $608,640 total.

This estimate is for a separate law library building. In a larger building, such as part of a courthouse, the cost per cubic foot would be materially higher, and the Law Library would probably have to be prepared to pay more for its quarters, but it would seem that it should not be called upon to pay in excess of 10% more.

Can We Afford It? The answer is yes, very probably, but not so surely (in view of the unknown factors) that we can get gay about it! We have available a little over $800,000, —yep, that's *it*—, of which we should keep some $100,000 for current reserve. That would leave, after paying for the building, less than $100,000 for additional duplicates and special expansion of the collection when we first move into the new quarters.

In a pinch,—for example if we have to buy the land on which to build—we can delay buying the extra books and leave some of the stacks without shelves. We can probably get along with some old furniture and equipment. We can even delay buying some of the special equipment which we'll want for the new quarters. But for our own and our clients' sake, let's not take less than what we want for the rest. Let's not pinch on quality in the specifications. Let's not save on space in the plans.

We may not be rich, but we can afford the best!

TAXATION OF COMMUNITY INCOME —COMMISSIONER v. HARMON*

By Walter L. Nossaman, of the Los Angeles Bar

Commissioner v. Harmon, decided by the Supreme Court of the United States on November 20, 1944, involved the community property law of Oklahoma, effective July 29, 1939. The Oklahoma law, like that of Oregon, is operative only if and when husband and wife elect to avail themselves of its provisions. Harmon and wife filed the required election October 26, 1939. The income in controversy received during November and December, 1939, consisting of Harmon's salary, dividends from stocks theretofore owned by each of the spouses, interest on obligations due Harmon, profits of a partnership of which Harmon was a member, and oil royalties due to each of the spouses, was community income under the terms of the act.

Reversing both the Tax Court (1 T. C. 40) and the Tenth Circuit Court of Appeals (139 Fed. 2d 211), the Court holds the income indivisible for income tax purposes. The question was whether *Poe v. Seaborn,* 282 U. S. 101 (1930), and the cases following it, or *Lucas v. Earl,* 281 U. S. 111 (1930), governed. The *Seaborn* and its companion cases permitted the division, for tax purposes, of community income between spouses domiciled in the original community property states; the *Earl* case held anticipatory assignments of income ineffective for tax purposes. *Lucas v. Earl,* not *Poe v. Seaborn,* was held to furnish the appropriate analogy, and the taxpayer lost.

Speaking through Mr. Justice Roberts (who wrote the opinion in *Poe v. Seaborn*), the Court classifies communities as of two sorts, consensual and legal, and says that a consensual community arising out of contract does not significantly differ from such a status as was in question in *Lucas v. Earl;* that, on the other hand, in *Poe v. Seaborn* "the Court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the state." The Court is unable to say that Oklahoma has any new policy since 1939, "for it has not adopted, as an incident of marriage, any legal

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*This discussion was contributed at the request of the Bar Bulletin Committee.—Editor, Bar Bulletin.

community property system. The most that can be said is that the present policy of Oklahoma is to permit spouses by contract to alter the status which they would otherwise have under the prevailing property system in the state." The opinion points out that even without legislative permission married persons in many non-community states might by agreement make a similar alteration in their prospective rights to the fruits of their labor or investments, and that this is possible in every state where husband and wife are free to contract with each other.

For the purposes of the decision the Court assumes, without deciding, that the community property status of Oklahoma spouses, once established, is at least equal to that of man and wife in any community property state, and says, "The important fact is that the community system of Oklahoma is not a system, dictated by state policy, as an incident of matrimony."

Of some interest to California lawyers is the Court's discussion of *United States v. Robbins,* 269 U. S. 315 (1926) and *United States v. Malcolm,* 282 U. S. 792 (1931), both involv-

ing California community income, the first arising before, the second after, the enactment of Civil Code Section 161a in 1927. The history of the visissitudes of the wife's interest in California community, whether a mere expectancy or "a present vested interest," is referred to. (The Court's reference to a California statute of 1926 is an obvious inadvertence.)

Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented, but not because of any predilection in favor of community property. He says: "The federal income tax law makes a discrimination in favor of community property states. . . . The source of that discrimination is to be found in decisions of this Court." The theme of the dissent is that although Mr. Justice Douglas plainly does not adhere to the doctrine of the community income tax cases—"I do not mean to defend *Poe v. Seaborn*"—he believes that if "an exception to the general rules of liability for income taxes" is to be created, it should be uniform in its operation. Rejecting the Court's distinction between a consensual and a legal community, he points

out that in the legal community property states the rights of the spouses may be altered by contract, converting separate into community or vice versa. This, he contends, gives effect to arrangements which are not strictly an incident of matrimony but are based upon mutual consent.

Although speculation regarding the import of a judicial decision as to matters not directly involved is generally unprofitable, the interest of California lawyers in the general topic is sufficient to justify a further brief scrutiny of the possible result of Oklahoma's somewhat cautious venture in community property. Two questions present themselves: *First,* does the decision impair or weaken *Poe v. Seaborn?* Second, does it offer any indication of the Court's probable attitude toward the 1942 amendments to Section 811(e), I.R.C.?

As to the first question, it seems plain that the decision in the *Harmon* case marks definitely the end of any hopes the Treasury may have entertained of using it as the spearhead of an attack on the community property income tax cases. The majority seems satisfied with the vested interest concept; and the other ground relied on in *Poe v. Seaborn* and referred to to in the *Harmon* case, namely, implied legislative approval of the prevailing method of taxing community income, has been reinforced by continued Congressional acquiescence while seven additional Congresses have come and gone.

As to the second question, although only an optimistic taxpayer would derive much encouragement from the decision, it is hard to find anything in it (except perhaps the two dissents) that will encourage the government. Here again, the vested or equal ownership theory relied on in *Poe v. Seaborn* aids the taxpayer. But the additional ground of Congressional acquiescence in administrative (or judicial) rulings no longer aids him. Congress, by ceasing to acquiesce, has left him standing on his constitutional rights, no longer a beneficiary of Congressional inaction. He must now invoke the principle implicit in the very concept of community property, of which the Court says in the *Harmon* case, "Under that system, as a result of state policy, and without any act on the part of either spouse, one-half of the community income vested in each spouse as the income accrued, was, in law, to that extent, the income of the spouse."

Is the accumulated product of community industry and skill similarly vested? What is the extent and quality of the resulting ownership? What are its estate tax consequences? The answers to these questions will have to await the Supreme Court's pronouncement when the 1942 amendments come before it for review. The lesson to be drawn from the *Harmon* case is that a timid acceptance of the community property principle, so nicely adjusted as to procure certain of its benefits without assuming (except voluntarily) its burdens, is ineffective as to federal income taxes. Any expectation or hope that a comparable result will be reached where community status is the result of the "inveterate policy" of the State finds no support in the decision; in fact, its reaffirmation of the equal ownership concept points in the opposite direction.

CLEVER ENGLISH TRIAL PROCEDURE

By Myron Westover, Presiding Judge of the Superior Court*

BEFORE starting to talk about English trial procedure, I must say a few words about the urgency of determining whether we are to simplify and shorten *our* trial procedure before we complete our plans for *our* new courthouse. We should know now how many departments to build for.

United States District Judges J. F. T. O'Connor and Peirson M. Hall have given valuable suggestions about space requirements based on their experience with their courts in the new federal building. Judge O'Connor told us that when the architect for the new federal building brought the plans to him in Washington, where he was Controller of the Currency, asking suggestions, his reply that the building was not half large enough, was laughed at, and this brought the rejoinder from him, "Oh but you do not know Los Angeles and its wonderful growth, past, present and future." We were told that the Government is now paying astronomical sums in rentals for outside space in Los Angeles. Judge Hall suggested that it would be wise to reserve ground enough on the site to accomodate an additional wing for future growth if needed. When one of our superior court judges, he

*The author wishes to make it clear that he speaks only for himself. The views expressed in this article do not necessarily represent the views of the judges of the superior court.

was a very active member of the Courthouse Committee and did a great deal of the preliminary work on plans.

In May and June, 1923, I had a rather casual look at English courts and procedure in London while on a pleasure trip, with no thought of an investigation or study. To see the courts in operation I went alone to the Royal Courts of Justice on the Strand. Upon making an inquiry, I found I was talking to a very charming young barrister admitted to both the Scotch and English bars. He very kindly took me in tow and showed me the inns of court and several of the courts in session. I recall that Sir John Simon was arguing an admiralty case concerning a collision of ships at sea. In another department the witness on the stand was the Chief Justice of the Supreme Court of Greece, from Larissa. He was testifying as an expert concerning the legal effect under Greek law of some decrees of a provisional government or board during the First World War. The subject matter was the proceeds of a cargo of Greek currants which, as I recall, had been seized and sold in London. I noticed in the morning paper the next day that the

plaintiff was the King of the Hellenes. The impression I received at the time was the universality of English law in various parts of the world. Here was the King of Greece, a suitor in a London court in which the Chief Justice of the Supreme Court of his own realm was an expert witness. And yet a foreign ruler could be a plaintiff in our own court, just as any foreign citizen might be. Indeed, I recall trying a case a number of years ago in which a French plaintiff was suing concerning the beautifully hand-carved and wrought elevator cars in the Oviatt Building.

My friend also explained the simplicity of English appeals. One wishing to have his case reviewed merely gave notice of appeal, and the "papers were sent upstairs." That meant the file itself went to the Court of Appeals upstairs where the case would be reviewed as to its merits, being orally argued without briefs or printing of any kind. There are no assignments of errors or any technicalities. The primary questions on appeal are: Did the parties have a fair trial and was justice done? Decisions are prompt.

Promptness and swiftness of decisions is well illustrated by trial of a case about a very mysterious murder committed the last day of June, when we were leaving London for a second visit to the continent. On our return to London on August 1, we found the mystery had been solved by Scotland Yard, the murderer apprehended, tried and his appeal heard and he executed—all during the month of July, 1923.

Will Rogers, in one of his messages from London about 1930 or 1931, told how the English convicted the ten million dollar swindler "so fast it took the American's breath away. All they have talked about today is English justice compared to ours. It is the concensus of opinion of all of them here that if it had been at home he would have gone into vaudeville or into the Senate. . . . Our delegation ought to be over here studying British justice."

Owen J. Roberts, in an address before the New York Bar a year or more before his appointment to the Supreme Court of the United States, said: "There certainly ought to be some way by which we can in this country settle issues and settle evidence in advance of trial. I know of no serious effort that has been made to do it as yet." After referring to the fact

that judicial reform in England was brought about through laymen, he continues: "Shall we let the laity here find our faults in procedure and press upon us the correction, or shall we try the experiments that seem approved to bring our procedure to a higher point of efficiency?"

I also lunched with my charming guide, philosopher and friend, in the Hall of the Inner Temple. It is a very impressive Gothic room, with beautiful panelling and stained glass windows, with the coats of arms of the families of many of the various benchers. He explained to me the custom by which, before admission to the bar, a Cambridge or Oxford man must have eaten a certain number of dinners in the Hall. Upon application for admission to the bar, a committee of members would consider his case in star chamber conference. If they considered him worthy, he would be invited in and offered a glass of wine, indicating that he was approved. He told me of his law examinations. He was supervised in study by a quiz master or faculty member assigned to him, perhaps as an adviser. When he reported that he was ready for examination on contracts he was invited to the home of his mentor. Upon arrival, he found him seated before the open fire, smoking a pipe, reading a book. He was invited to pull up a chair and have a glass of wine. After discussing cricket and the crew races for a time, he was finally asked what he thought of this old chap Anson, to which he replied in rather general terms, and was then asked a number of questions on various principles involved. After rather full discussion of them, his questioner expressed himself as satisfied that he had passed that part of the course.

We had previously learned considerable about the inns of courts and their traditions and the many famous men who had lived in them, through the informative and delightful letters of a dear friend and noted engineer who had lived in London during World War I and for many years afterwards. He and his wife were so fortunate as to be able to lease from a young barrister going to the front his chambers at 12 Kings Bench Walk, Inner Temple. They were the chambers formerly occupied by Samuel Warren, who there wrote his "Ten Thousand a Year." This suggests the permanence of things English. Our engineering friend and his wife took us on a motor trip of some ten days

visiting the historic inns of southern and southwestern England. "The New Inn" at Gloucester was much more than four hundred years old at the time we visited it in 1923. Probably several of the others were older.

In the fall of 1933 I went up to British Columbia to observe their trial procedure, this time with the purpose of learning something about it. In Victoria I called upon Chief Justice Morrison and spent a delightful afternoon with him at his Empire Club, there being no court business that day. There is but little business to engage the court in Victoria; so the six justices of the Supreme Court of British Columbia sit two months of each year in Victoria in rotation, in lieu of vacations.

Three incidents will show the fineness of that Scottish community: I arrived in Victoria hatless, my new hat having been lost or stolen in route. I went at once to a hat shop and found that the exact hat I wanted had arrived but had not cleared customs. The gentleman insisted that I take one almost like mine and wear it until his new shipment cleared in a day or two, and then come and get the new one and pay for it then. I had films developed and prints made. On calling for them two or three days later, the agreed fee had been reduced because the U. S. exchange rate had changed in my favor. On Sunday the church was filled. Mrs. Westover and I strolled about after church and found *all* business places closed and the town especially quiet and restful. We paused before a theatre to read the billing of Beatrice Lilly. A lumberjack from some two hundred miles away explained that he had come especially for Beatrice Lilly's performance and he would have to stay over for that reason.

In Vancouver I sat with four judges, one day each, in rotation, the other week day being the national Thanksgiving Day, November 9th. The judge handling equity and admiralty cases was the only one to wear a wig, and the only one to habitually use a very long old-fashioned quill pen. They use two types of juries, one of twelve members paid $2.00 per day each, and the other of eight members of a supposedly higher type of quality of jurors, paid $3.00 a day each. One of the cases that I sat in on was a personal injury case in which a lady slipped down a companion-way on an excursion steamer, and was injured. That

case had a $3.00 jury. Two of the cases I sat in, involved commercial questions, and were being tried by the judges without a jury.

The last case was a murder trial in which I saw the jury drawn. Twenty-four jurors were lined up against the wall as their names were called, all being Scotch names, probably due to the original Scotch settlement of that territory which was known as New Caledonia before it was organized as a territory and became British Columbia. Before the jury was completed forty-eight jurors had been so lined up. Each juror in turn was requested by name to "stand forth." Counsel for defense would study his lists and say "stand aside" or "be sworn" as the case might be. The clerk in each instance would swear the juror to try the case and request that he kiss The Book, passing an open Bible to him or her for the purpose. The judge whispered that the moment the juror touched the Book he had become a juror sworn to try the case, even before he or she actually kissed the Book. I said to the judge, "Have you no challenges for cause?" He said "Oh yes, but that has all been taken care of before they are called in for peremptory challenge. There are only four grounds of challenge for cause and they are taken care of by the affidavits required of the prospective jurors." The defendant sat in the prisoner's dock about the center of the spectators' portion of the courtroom. This was a square enclosure guarded at the four corners by militia men in uniform, bearing rifles with fixed bayonets. A large number of witnesses were examined, the case was argued and the jury orally charged before the end of the day. In the court's discussion of the evidence the jury was very clearly told that they were the sole judges of the weight of the evidence. The instruction and the analysis of the facts I considered a masterpiece.

I was profoundly impressed by the fact that during those four days in court I did not hear an objection to any question, any motion to strike testimony, no word of argument about evidence, and no ruling of any kind concerning evidence. The nearest approach to direction by any judge, was on one occasion when the judge very gently and quietly said, "Mr. Blank I think I would not pursue that subject further." Counsel replied, "Very well, your Lordship."

I was also profoundly impressed by the great dignity of all concerned in the courtroom, the great deference to one another, and the fact that no voice was raised in anger, protest, or criticism. It seemed to me that no needless word was used. I was and am at a loss to understand how it was possible; yet I saw it and heard it.

In each case counsel stood while examining witnesses or addressing the court. Counsel would rise and bow to the court and the court would return his bow. He would bow to counsel, and the counsel would return his bow. Then followed the questions and answers in the usual way. I have often wondered how much the fact of standing counsel was responsible for cutting down the number of words used, and the amount of time consumed in trials in British Columbia.

Speaking now of pleading and practice, the Bible of the lawyer and judge in British Columbia is published annually under the name of "The Annual Practice," and is the size of a city directory, cheaply bound and printed in comparatively small type. This Bible contains the equivalent of our Code of Civil Procedure and Probate Code, form books and court rules. It also contains full annotations, court fees, tables of contents of statutes, of cases, notes on procedure and practice, index to forms and general index. These forms include many forms of endorsements of claims of plaintiffs and of endorsements of defenses for use of defendants. I understand it is used by the English in their administration of justice in various parts of the world.

Professor Edson R. Sunderland, of the University of Michigan law faculty, probably our leading authority on pleading and practice, writing of the English procedure in 1926, said: "The pleadings themselves are designed merely to give sufficient notice, and no technical objections can be raised to any pleading on the ground of want of form. The Court has prepared a large number of very short and simple forms to be used as needed, and the lawyers are charged with costs if their pleadings are more prolix than the forms. There are no demurrers, but further and better pleadings may be ordered at any time. . . . Pleading under these rules has certainly lost its terrors, and it is hard to see how the merits of a case could ever be jeopardized

by errors of the pleader. Indeed, the subject has become so simple and is treated so sensibly that during the twenty-three years from 1903 to 1926, Mews English Digest shows only eighty-five cases in the English reports dealing with the field of pleading and parties. . . . The English practice in taking an appeal so successfully meets its theoretical aim that there is almost no way of making a mistake. Nothing is required but the ability to read and to operate a typewriter. . . . The credit for the present English practice is due to the energy and determination of the public, and not to the leadership of the bar, during a century of struggle for procedural reform. The British public, with its strong business sense, refused to believe the true remedy for defective machinery was the employment of more engineers to keep it going." In the last sentence, he was referring to the remedies advocated in England over a century ago of relieving court delay by appointing more judges, instead of reforming procedure. We see by his quoted description of the vast improvements that the English public chose reform.

Are the English judges, lawyers and laymen smarter than we Americans? Are we smart enough to learn from their experience? What do *you* think?*

*Judge Westover is greatly interested in receiving expressions of opinion with respect to the suggestions and views stated in the foregoing article. Members of the bar and others are invited to write to Judge Westover in his chambers or in care of the Bar Bulletin.—Ed.

PROCEDURAL REFORM IN ADMINISTRATIVE TRIBUNALS —THE "ABA BILL"

By Ewell D. Moore, of the Los Angeles Bar

PERHAPS it is too early to hope for the enactment of the McCarran-Sumners Administrative Procedure Bill (S.2030; H. R. 5081) in its present form, but it is not too soon for members of the bar and bar associations, to study its provisions and to promote its passage.

This is the American Bar Association's bill prescribing fair administrative procedure. It is the result of several years of continuous study by its special committee on administrative law,

and was unanimously adopted by the ABA House of Delegates as a proposed federal statute on the subject.

The proposed measure is limited to administrative agencies and judicial review of their regulatory actions, and is designed to correct the combination of judicial and prosecuting functions found in many agencies. It excludes all war agencies from its operations.

As introduced in the Congress, the measure's simple and basic purposes are summarized as follows:

1. It requires administrative agencies to publish their organizations and procedures, and to make available to public inspection their orders and releases.

2. On rule making, it requires that agencies publish notice and at least permit parties interested to submit views or data for consideration.

3. As to adjudication, it provides that, in the absence of agreement through informal methods, agencies must give the parties notice, hearing, and decision before responsible officers; and for the segregation of deciding and prosecuting functions.

4. As to judicial review, it provides forms of review actions for the determination of all questions of law in all matters not expressly committed to executive discretion.

In explaining the scope of the proposed measure, the ABA special committee's pamphlet contains comment on each of its eleven sections and many subsections, saying that:

"It sharply distinguishes between rule making and administrative adjudication, but its hearing and decision requirements are not imposed where Congress has not required an administrative hearing. . . . It does not supersede or revise the judicial review accorded by the legislative courts such as the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, or the Court of Claims."

It will be remembered by most lawyers, that the Attorney General recommended an investigation of administratic procedure to point the way to improvements and that the President authorized the appointment of a committee to make a comprehensive study and recommendations. The committee issued studies of regulatory agencies and an extensive report.

"These and other studies, as well as the experience of most

people," says the ABA committee's report, "have centered attention upon the simple rudiments of administrative justice. First is the necessity for the publication of needed information on administrative law and procedure. Second is the conviction that, while the right and scope of court review should be defined, they must be rested upon sound definitions of administrative process and procedure itself. Third, is the recognition that there are two types of administrative action—(1) the administrative making, issuance, and enforcement of regulations of general applicability and (2) the administrative adjudication of specific cases. Each of the two principal types of administrative action calls for a simple definition of rights and procedure respecting hearings and decisions, with provisions for the separation of prosecuting and deciding functions."

The Committee gives a synopsis of the proposal as follows:

SEC. 1 defines agency (excluding war agencies or functions), rule or rule making, and order or adjudication.

SEC. 2 provides for the publication of agency organization and procedure, and for either publication or public availability of rulings, orders, and releases.

SEC. 3 provides for notice and procedure in the making of "substantive" regulations.

SEC. 4 provides for notice and procedure in administrative adjudication, and authorizes the issuance of declaratory orders.

SEC. 5 provides for the appearance of parties, investigations, and subpoenas as matters ancillary to other types of administrative activity.

SEC. 6. provides requirements for hearings in connection with rule making or adjudication in cases where Congress has required a hearing and there is no subsequent trial *de novo* in court.

SEC. 7 provides for decisions in matters subject to Section 6.

SEC. 8 limits penalties to authority conferred by law, prohibits denial of statutory benefits, and makes special provision for licensing sanctions.

SEC. 9 restates existing rights of judicial review, with a specification of the categories of questions so reviewable.

SEC. 10 provides for the "internal" segregation of administrative prosecuting and deciding functions.

THE BAR ENDOWMENT CORPORATION.

THOSE MEMBERS of the Association who may have overlooked the event, are reminded that the . . .

LOS ANGELES BAR ASSOCIATION ENDOWMENT

was incorporated last January for the purpose of receiving gifts, donations and bequests.

Money or property so received is to be used to advance the science of jurisprduence; assure adequate legal service for indigent persons, and for the many other worthy purposes set forth in its Articles.

A few have made donations of substantial sums.

No doubt many others intend to. Now is the opportune time.

Gifts, bequests, and devises to the Endowment, a non-profit corporation, fall within the tax exempt class.

For complete information call or write to any Officer or member of the Executive Committee, Room 1124 Rowan Building, Los Angeles 13.

★

Their names are as follows:

OFFICERS:

Richard J. Dillon, President
Wm. C. Mathes, Vice President
Harry J. McClean, Vice President
Alexander Macdonald, Vice President
Alex W. Davis, Secretary
Ewell D. Moore, Treasurer

EXECUTIVE COMMITTEE:

Norman A. Bailie
Kemper Campbell
Frank B. Belcher
John C. Macfarland
Loyd Wright

SEC. 11 contains provisions as to the construction and effect, including the effective date, of the proposal.

ABA circular asks that each member constitute himself a committee of one to do what he can to aid in securing favorable consideration of the Association's objective—the improvement of the administration of justice through the adoption of a statutory framework of fair administrative procedure.

JUDICIAL COUNCIL'S ADMINISTRATIVE AGENCIES SURVEY AND PROPOSED ACT

By Ewell D. Moore, of the Los Angeles Bar

A tentative draft of proposed statutes and a constitutional amendment, for improving administrative procedure in California, has been approved by the Judicial Council for submission to the next session of the legislature.

In submitting its voluminous report of the survey, and the tentative draft of proposed statutes and the amendment, the Council invites suggestions or criticisms, and says that members of the research staff hope to meet with many bar associations to discuss the material. Following is a digest of the proposed act.

The proposed act, as drafted, applies to formal disciplinary proceedings brought by administrative licensing agencies which are subject to the direct control of the Legislature. The act, says the report, will provide a uniform procedure in place of the diverse practices now used by the various licensing agencies. The Industrial Accident Commission and the Rail-

road Commission were excluded from the survey because their constitutional status puts them in a special category. It is proposed that the act be made Title 10 A, Code of Civil Procedure.

In its "comment" the survey says that before attempting to phrase the sections on pleading it was necessary to determine the functions of such pleading; the purpose of the pleading being to give notice to the adverse party, and to formulate issues to be presented.

The initial pleading is termed "Accusation," as distinguished from the common judicial pleading, the complaint. The Accusation shall contain a statement of the charges, specify the statutes and the rules of the agency, and be verified, but may be verified on information and belief.

The Accusation and any accompanying information, may be sent to the respondent by any means selected by the agency. But no order other than dismissal shall be made by the agency in any case unless respondent shall have been served personally or by registered mail, return receipt requested, or shall have filed a notice of defense or otherwise appeared.

The agency may include with the Accusation any information it deems appropriate, but it shall include a post card or other form of notice entitled Notice of Defense, which when signed by or on behalf of Respondent and returned to the agency, will acknowledge service of the accusation and constitute notice of defense. The copy of the accusation shall include or be accompanied by a statement that respondent may request a hearing by filing a notice of defense within twenty days after service of the accusation. Failure to do so shall constitute a waiver of his right to a hearing. Personal service may be proved as in civil actions.

Within twenty days after service of the accusation, respondent may file a notice of defense, requesting a hearing; object to the accusation on the ground it does not state acts or omissions upon which the agency may proceed; object to the form of the accusation as indefinite or uncertain, or deny the accusation in whole or in part.

The respondent shall be entitled to a hearing on the merits if he files notice of defense. Failure so to file shall constitute

a waiver of respondent's rights to a hearing, but the agency may nevertheless grant a hearing.

At the time the matter is submitted for decision the agency may permit the filing of an amended or supplemental accusation, and if it presents new charges, the agency may grant respondent a continuance, but the respondent shall not be entitled to file a further pleading unless the agency, in its discretion, so orders.

The agency shall determine the time and place of hearing. It shall deliver notice of hearing to respondent at least ten days prior to hearing, but such notice shall not be prior to the expiration of the time within which respondent is entitled to file a notice of defense.

If the respondent fails to file a notice of defense or to appear at the hearing the agency may take disciplinary action based upon respondent's express admissions or upon other evidence.

The proposed act provides that before the hearing has commenced any member of an agency shall issue subpenas and subpenas duces tecum at the request of any party; also, after hearing has commenced the agency hearing officer may issue subpenas and subpenas duces tecum. The process shall extend to all parts of the state and may be served in the manner provided for service of the accusation. No witness shall be obliged to attend at a place out of the county in which he resides unless the distance be less than 100 miles from his place of residence.

Each witness appearing on subpena or subpena duces tecum, other than a party or an officer or employee of the state or any political subdivision thereof, shall receive fees and mileage in the same amount and under the same circumstances as now or thereafter prescribed by law for witnesses in a civil suit in a superior court. Fees shall be paid by the party at whose request the witness is subpenaed.

The act provides for taking depositions of material witnesses in or out of the state in the same manner as in civil actions.

The Director of the Department of Administrative Agencies shall have power to appoint hearing officers to be attached to the Department from a list of qualified persons who have

passed an examination given by the State Personnel Board. To be eligible for the examination an applicant must have been admitted to practice law in California for three years, or shall have obtained the authorization of the Director of the Department. Any agency shall have power to appoint hearing officers, to be attached to the particular agency, from among persons who have passed the examination of the State Personnel Board. If no hearing officer is readily available, the agency may, on written consent of respondent, designate a hearing officer pro tem who must be admitted to practice law in California. Hearing officers may serve full time or part time. Compensation shall be fixed by the appointing agency. The proposed act leaves the compensation blank to be fixed later.

All hearings in contested cases shall be presided over by a qualified hearing officer selected by the agency involved in a particular case. Each party shall have the right to call and examine witnesses, introduce exhibits, cross-examine ap-

pearing witnesses; to impeach any witness regardless of which party first called him, and to rebut the evidence against him. Respondent, if he does not testify in his own behalf, may be examined as if under cross-examination. The agency shall not be bound by technical rules of evidence, but shall admit any relevant evidence if it is of the sort on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule. Hearsay evidence may be used to supplement or explain any direct evidence, but shall not be sufficient in itself to support a finding unless sufficient for that purpose in civil actions.

Affidavits may be used in lieu of oral testimony, provided, the opposing party shall have the right, on request made prior to submission, to cross-examine the affiant.

In reaching a decision the agency may take official notice, either before or after submission, of any generally accepted technical or scientific matter in its special field, and of any fact which may be judicially noticed by the state courts.

The agency or hearing officer may certify facts pertaining to acts of contempt to the superior court of the county where the proceedings are held.

In contested cases the decision shall be made either by the hearing officer alone or otherwise by the agency. No member of the agency who has not heard the evidence may vote on the decision. Decision in uncontested cases may be made by a hearing officer designated by the agency. The decision, in writing, shall contain findings of fact, a determination of guilt or innocence and the penalty, if any. A copy of the decision shall be delivered to respondent personally or sent by registered mail, and shall become effective thirty days after it is served, unless a stay of execution is granted, or unless within that time a reconsideration is ordered. At any time before the decision becomes effective a stay may be granted. The agency may reduce the penalty or reinstate the respondent at any time with or without a hearing.

Within thirty days after the last day on which reconsideration can be ordered, a petition for a writ of mandate may be filed under the Code of Civil Procedure. The right to petition

shall not be affected by failure to seek reconsideration before the agency. The record, or such parts as may be designated in the petition shall be prepared by the agency, at petitioner's expense, and shall include the pleadings, notices, orders, the decision, a transcript of the proceedings, exhibits, the written evidence, and any other papers in the case.

DEVELOPING JUDICIAL ORGANIZATION

By Frank G. Tyrrell, Judge of the Municipal Court

ALL forms of government find their completion in the court of justice. Whatever the political structure, the time when courts are formed for the administration of justice is the *terminus ad quem*. The development of judicial organization in America has been slow and halting, all the way from its first impress in the newly founded colonies to the still chaotic present. This is no place for a review and critique; but it is desirable to note that social organization for the judicial function has developed, and is still in process.

Now the State Bar is zealously at work on the matter, would it not be well to survey the whole field, adopt a comprehensive scheme, eliminate lost motion, over-lapping, delay, and waste of time, talent and money?

Why not establish one great court, with the necessary tribunals as departments or divisions? In a word, integrate and co-ordinate all the separate tribunals into the judicial department of the state government, with a minister of justice and subordinates to supervise.

This is of course neither new nor original. It seems to have been the creative concept of Roscoe Pound, first broached by him at the turn of the century. (29 Rep. Am. Bar Assn. 395.) The obvious waste of judicial power in the State of Nebraska moved him to study court organization, especially the unification of the judicial system of England as reflected in the Judicature Act of 1873. Since then, sporadic discussion has gone on, led by Dr. Pound and participated in by Leon Green, W. F. Dodd, and other pioneering thinkers.

We have, praise be, an integrated, self-governing State Bar An integrated, self-governing state judiciary is its inevitable corollary.

Such a statesmanly step forward will contribute much to the restoration of public esteem and confidence,—or better, perhaps, to the creation of confidence in our courts and respect for them—imparting that prestige without which their work is rendered more or less nugatory as a social factor.

It would also, by virtue of enhanced prestige, affect the personnel of the various tribunals, making it easier to enlist men of wide and accurate learning and higher competence in judicial careers. One cannot but be impressed with the generally good grade of talent seen on the bench, in spite of defects in the mode of selection and of tenure. After all, it is the character of the judge that determines the sort of justice dispensed.

Still further, it would be a strongly deterrent influence to the continuous and increasing creation of administrative tribunals. Unless and until we "do something about it," about the delay and cost of litigation, we cannot consistently complain if court functions are usurped, and the three departments of government are more and more merged into these prolific administrative commissions.

A volume might be written describing the particular gains of a unified state judiciary. For example, while unified, it will not be rigid, but quite the contrary, flexible, in order the more promptly and efficiently to perform its varying tasks; it will conserve and utilize to the full its man-power; and it will provide a responsible management, so if at any time the system is not efficient, the people will know where to look and whom to call to account.

It seems that as our civilization evolves, the institutions and functions of government will multiply, with an attendant increase in the burden of taxation,—already tremendous. It is plain that economies can and will be effected by the establishment of a court of justice of the State of California. This is wholly by way of suggestion; what do you think of it?

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